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No. 85-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

POTT INDUSTRIES INC.,
Petitioner,

vs.

INGRAM RIVER EQUIPMENT, INC.,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Does a Court have jurisdiction in admiralty of a tort action to recover damages for economic loss, against a shipbuilder whose negligence, in the design, use of materials, and failure to test the purging capacity of a steam heating system in tank barges constructed to transport heavy grades of petroleum products, caused fractures and leaking coils, necessitating repair and replacement of the entire coil system?

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BRIEF OF RESPONDENT IN OPPOSITION

Because the decision of the United States Court of Appeals for the Eighth Circuit in this case follows applicable rulings of this Court and involves none of the criteria warranting review, Respondent Ingram River Equipment, Inc. ("Ingram")[1] respectfully requests that this Court deny the petition of Pott Industries, Inc. ("Pott") for a writ of certiorari.

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[1] Ingram is a wholly-owned subsidiary of Ingram Industries, Inc., a privately owned corporation. It does not believe it has any subsidiaries or affiliates within the meaning of Supreme Court Rule 28.1.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Ingram River Equipment, Inc. v. Pott Industries, Inc.*, 756 F.2d 649 (8th Cir. 1985). The Eighth Circuit affirmed the decision of the United States District Court for the Eastern District of Missouri, reported at 573 F.Supp. 896 (E.D. Mo. 1983). The two opinions appear as Appendix A-1 and B-1, respectively, to the petition for a writ of certiorari.

STATEMENT OF THE CASE

Petitioner seeks review of a decision holding that a Court has jurisdiction in admiralty of a negligence action against Pott, a shipbuilder whose improper design, use of unsuitable pipe, and failure to test the purging capacity of the steam heating system installed in tank barges caused damage to its customer, Ingram, consisting of the expense of repairing the fractured and leaking coils and then replacing the entire coil system.

I. The Facts.

Pott built for Ingram four tank barges which were designed to transport heavy grades of petroleum products. A steam coil system was installed in each vessel, because the cargo required heating for unloading. After the vessels were launched and placed in service, numerous fractures were discovered. At first, Ingram had the leaking coils repaired. When the problem continued, the entire coil systems were replaced with seamless steel, which is stronger than furnace-weld pipe used in the original construction. Design changes were also made to facilitate removal of condensed water.

Ingram sued Pott to recover the expense involved, lost profits, and prejudgment interest.

II. Opinion Of The District Court

The parties agreed that the leaks were most likely caused by freezing water that remained in the coils after steaming. Following a twelve day trial on the merits, the District Court held it had jurisdiction in admiralty of the cause of action for a maritime tort. Pott was found "negligent in its design of the steam coil heating system and in its choice of furnace-weld pipe in the construction of the system" and "negligent in failing to test the purging efficiency of the steam coil heating system." (573 F.Supp. 900, Findings of Fact, pars. 18, 19, Pet. B-6)

The District Court also concluded that Pott "breached its implied warranty of fitness" for a particular purpose under Missouri Annotated Statutes, Section 400.2-315 (Vernon 1959), in that the systems were inadequately designed to purge condensed water out of the coils, after they were filled with steam, and the furnace-weld pipe was inadequate to perform its function. (573 F.Supp. 902, Pet. B-9-11)

The District Court found the evidence insufficient to support Ingram's claim for loss of profits (573 F.Supp. 902-3, Pet. B-12-13) and entered judgment for the recovery of repair and replacement expenses in the sum of $361,757.00, plus prejudgment interest and costs. (Pet. B-16).

III. Opinion Of The United States Court Of Appeals For The Eighth Circuit

The Eighth Circuit affirmed the conclusion of the District Court on the issue of jurisdiction, noting that the case met the "two-factor test set forth by the Supreme Court in *Executive Jet Aviation v. City of Cleveland,* 409 U.S. 249 (1972)":

> In this case there is no dispute that the wrong or its result - the ruptured coils - has a marine locality, since the splits in the coils occurred after the barges had been launched.

Moreover, the wrong bore a significant relationship to maritime activity. As the court observed:

> Here the splits in the coils directly affected the barges' use in maritime commerce. Without functioning heating coil systems, the barges could not be used effectively to haul heavy petroleum products that require heating before unloading. (756 F.2d 651, Pet. A-4).

The Court found that the evidence supported the conclusion of the District Court on causation, negligence and damages. (756 F.2d 653-4, Pet. A-8-9). It rejected Pott's argument that the Missouri common law doctrine denying recovery for economic loss alone should be applied in admiralty:

> We think the better reasoning supports allowing recovery in tort, at least where, as here, there is a finding of actual negligence, as opposed to a mere defect not resulting from any lack of due care. If a manufacturer is negligent, that is, if its product was not put together with the ordinary care that a reasonably prudent manufacturer should have used, it should pay for the resulting loss. The contrary rule, that the loss should be borne by the innocent purchaser, is unjust, in our opinion. We therefore hold that the economic-loss doctrine does not bar recovery of economic losses in a negligence action under maritime law. (756 F.2d 653, Pet. A-8).

Having held Pott liable on the basis of negligence, the Court found it "unnecessary to discuss plaintiff's breach-of-warranty theory, which would provide an alternative basis for recovery." (756 F.2d, Fn. 7, 653-4, Pet. A-8, Fn. 7). Accordingly, the Eighth Circuit decision raises only the issue of maritime tort law. No issue of Missouri contract law is involved.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Eighth Circuit in this case carefully follows the applicable rulings of this Court.

The two requisites for jurisdiction in admiralty were present: marine locality and a significant relationship to maritime activity. It was undisputed that the fractures of the steam coils in the four tank barges built for Ingram occurred after the vessels had been launched and were in service. Moreover, the injury bore a significant relationship to maritime activity since it disabled the barges from being used in maritime commerce to move heavy petroleum products that require heating for unloading.

For about a century, this Court has upheld jurisdiction in admiralty for economic losses. The law is clear that maritime rights will not be limited by the application of state common law doctrines.

There are no "special and important" reasons present in this case to warrant granting the petition for a writ of certiorari. There is no conflict in the circuits. A fair reading indicates that the decision of the United States Court of Appeals for the Third Circuit in *East River Steamship Corp. v. Delaval Turbine, Inc.*, 752 F.2d 903 (1985), that economic losses are not recoverable in admiralty, relates to the doctrine of strict liability. This case (Ingram-Pott) involves an action for negligence; and the decision of the Eighth Circuit proceeds solely on that basis and not on the doctrine of strict liability.

The doctrine of strict liability expanded the liability of a manufacturer or builder to include liability without fault and without privity. However, it is an additional remedy to the traditional tort action in admiralty for negligence. Neither the history nor the rationale of the doctrine of strict liability indicates that it was intended to displace or restrict the right to recover in admiralty for negligence; and the cases so hold.

There is no conflict between the decision of the Third Circuit in the *East River Steamship* case and this case. In addition, the newness of the issue of strict liability and its application to economic losses in admiralty suggest that review be deferred until the issue has matured with the passage of time.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The decision of the Eighth Circuit follows applicable rulings of this Court.

In its petition for a writ of certiorari, Pott attempts to portray the decision in this case as an innovative, precedent-shattering ruling. The reality is much different. An analysis will indicate that the opinion carefully follows the applicable decisions of this Court.

A. The jurisdictional requirements of *Executive Jet Aviation, Inc. v. City of Cleveland* were met.

The familiar two part test enunciated in *Executive Jet Aviation, Inc. v. City of Cleveland, supra,* required that the damage occur on navigable waters and that the wrong bear a significant relationship to maritime activity.

Both Courts below spelled out in detail the manner in which the test was met in this case. The fractures in the heating system occurred while the barges were on the navigable rivers and disabled them from transporting heavy grades of oil in commerce. The four tank barges were equipped with steam heating coils because they were built to move heavy petroleum products which required heating for unloading.

It is specious for Pott to suggest, as it has from the outset, that the injury was not maritime related because it did not affect the ability of the tank barges to navigate. Seaworthiness of a vessel is a major theme of admiralty. The term relates to the suitability of a vessel to perform its assigned task. As the Eighth Circuit stated in the Opinion:

> Without functioning heating-coil systems, the barges could not be used effectively to haul heavy petroleum products that require heating before unloading. (756 F.2d 651, Pet. A-4)

The two ingredients required for jurisdiction in admiralty were clearly present. *Jig the Third Corporation v. Puritan Marine Insurance Underwriters Corporation,* 519 F.2d 171 (5th

Cir. 1975), cert. denied, 424 U.S. 954 (1976); *Jones v. Bender Welding and Mach. Works, Inc.*, 581 F.2d 1331 (9th Cir. 1978); *Pan Alaska Fisheries, Inc. v. Marine Construction and Design Company,* 565 F.2d 1129 (9th Cir. 1977); *In re Motor Ship Pacific Carrier,* 489 F.2d 152 (5th Cir. 1974), cert. denied sub nom *Union Camp Corp. v. Gypsum Carrier, Inc.*, 417 U.S. 931 (1974).

Pott's suggestion that the decision conflicts with the ruling of this Court that a contract to build a vessel is not a maritime agreement, misses the mark. As the Eighth Circuit noted in its opinion, "the splits occurred after the barges had been launched." (756 F.2d 651, Pet. A-4). A tort occurs when the damage is sustained. Here, the damage occurred at the time of the splits and fractures, which took place after the vessels had been built and launched and were in service. The Eighth Circuit opinion was based on tort - not on contract; on negligence and not on strict liability.

B. There is admiralty jurisdiction of causes of action for damage for economic loss.

In affirming Ingram's right to recover the expense of repairing and replacing the fractured coils, the Eighth Circuit broke no new ground. For a century, the rulings of this Court have sustained jurisdiction in admiralty for the recovery of economic losses. *The Potomac,* 105 U.S. 630, 26 L.Ed. 1194 (1882); *The Conqueror,* 166 U.S. 110, 17 S.Ct. 510 (1897). Shipping has a dominant commercial flavor; and economic losses are not demoted to junior status. They are no less threatening to vessel operation than other types of damage or injury. Indeed, this is the basis of the doctrine of maritime liens, enabling the owner to keep his vessel moving, using it as security to finance the cost of repairs and supplies.

Accordingly, the decisions hold that jurisdiction exists in admiralty for causes of action against manufacturers or builders, where the only damage sustained by the purchaser was to the property purchased. *Jig the Third Corporation v. Puritan*

Marine Insurance Underwriters Corporation, supra; Miller Industries v. Caterpillar Tractor Co., 733 F.2d 813 (11th Cir. 1984); *Houston-New Orleans, Inc. v. Page Engineering Company,* 353 F.Supp. 890 (E.D. La. 1972); *Berg v. General Motors Corporation,* 87 Wash 2d 584, 555 P.2d 818 (1976).

In *Jig the Third,* the Court rejected the argument Pott makes here that, since the only damage suffered was to the vessel itself, the owner could not maintain an action in maritime tort. The Court quoted with approval Dean Prosser's comment:

> There can be no doubt that the seller's liability for negligence covers any kind of physical harm, including not only personal injuries but also property damage to the defective chattel itself. W. Prosser, The Law of Torts, Section 101 at 665-66 (4th Edition 1971). 519 F.2d 175.

The Court went on to say that numerous recent cases have so held. In *Jig the Third,* the owner suffered the loss of the vessel; in the instant case, Ingram, the owner, suffered the loss of the steam coils.

C. State Law will not be applied to narrow or destroy substantive maritime rights.

Pott contends that this case in admiralty should be governed by the State of Missouri common law rule stated in *R. W. Murray Co. v. Shatterproof Glass Corp.,* 697 F.2d 818 (8th Cir. 1983) that economic losses caused by negligence are not recoverable. The argument that admiralty law should embrace state common law doctrines comes late in the day. Decisions of this Court have established the rule that state law will not be applied in admiralty to defeat or narrow substantive maritime rights of recovery. Thus, the Court has refused to impose the common law rules relating to contributory negligence (*Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406 (1953); or releases to maritime claims (*Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 243-246 (1942); or state statutes of frauds to maritime con-

tracts (*Kossick v. United Fruit Co.*, 365 U.S. 731 (1961). The common law cases cited in Pott's petition including Appendix D are irrelevant at best. Once admiralty jurisdiction has been established, the substantive rules and precepts of admiralty become applicable in the interest of uniformity.

II. The Supposed Conflict In The Circuits Does Not Warrant Granting The Writ.

Petitioner suggests, as a basis for review, a purported conflict involving the decision of the Third Circuit in *East River Steamship Corp. v. Delaval Turbine, Inc.*, 752 F.2d 903 (1985). In that case, the Court ruled that damage due to a defective product is not actionable in tort unless the defective product harms or creates an unreasonable risk of harm to persons or property other than the product itself.

There are no "special and important" issues for this Court to consider. There is no square conflict in the circuits or with this case; and the newness of the issue cautions delaying judicial review, in any event. *East River* involves five counts, four of which are in strict tort liability and only one is in negligence. With the exception of the fifth count (asserted only by Richmond Tankers), plaintiffs withdrew their negligence claims, and those claims were dismissed with prejudice by the District Court. Accordingly, a fair reading of the opinion in *East River* shows that it deals with principles related to the doctrine of strict liability, not negligence, which was the basis for the decision in the Ingram — Pott case.

Indeed, in its petition, Pott acknowledges the limited nature of the purported conflict. In a footnote on page six, Pott states that the Fifth, Ninth and Eleventh Circuit decisions "do not conflict" with the *East River* decision and claims only that "in reality there is a clear cut split between the Eighth and Third Circuits on the substantive admiralty issue presented by this Petition."

Despite Pott's assertions to the contrary, this case simply involves the ordinary question of whether Pott was guilty of fault and should bear the burden of its wrongdoing. The decisions of the Courts below, in the instant case, after consideration of all the evidence, reached a fair and just result.

A. The supposed conflict related to strict liability—not negligence; and strict liability is not an issue in this case.

Negligence and strict liability stand in marked contrast with respect to both the rationale and basis for imposing liability. Pott seeks to engraft the rules taken from the doctrine of strict liability onto the doctrine of negligence, where they are inapposite.

The responsibility of the manufacturer or builder of a product has been expanded under the doctrine of strict liability in two major areas; there is liability (1) without fault to users or consumers and (2) with no requirement of privity. Strict liability applies — although "(a) the Seller has exercised all possible care in the preparation and sale of his product and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller." (Restatement (Second) of Torts, Section 402(A)(2)(a) and (b)).

The Restatement (Second) of Torts indicates that these changes "represented a departure from, and an exception to, the general rule that a supplier of chattels was not liable to third persons in the absence of negligence or privity of contract." (*Ibid,* Comment b).

> The justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who

> may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products. (*Ibid,* Comment c).

Courts have, of course, noted the difference between strict liability and negligence. In *Lindsay v. McDonnell Douglas Aircraft Corporation,* 460 F.2d 631, 637 (1972), the Eighth Circuit said:

> Negligence requires a different standard and quantum of proof than does strict liability in tort.

In *Emerson G.M. Diesel v. Alaskan Enterprises,* 732 F.2d 1468, 1473 (1984), the Ninth Circuit observed that, under a negligence theory, plaintiff must show defendant's "failure to adhere to an accepted standard of conduct." Under strict liability, plaintiff "must show that the product was defective and that the product was used in a reasonably foreseeable way."

In the cases imposing strict liability, questions were raised as to whether it was fair to hold a seller liable without fault and without privity if the product was not unreasonably dangerous and as to the expense of insurance if the risks covered included economic or qualitative losses. However, as the Restatement makes clear, these concerns did not apply to cases involving negligence.

> The rule stated here is not exclusive and does not preclude liabilities based upon the alternative ground of negligence

> of the seller, where such negligence can be proved." (Restatement (Second) of Torts, Section 402A, Comment a.)

If the builder was negligent, it would not be unfair to require that he pay for the resulting damage. Moreover, proof of fault would require evidence showing the existence of an obligation or duty of care. The expense of insuring such a risk, limited in this manner, could properly be regarded as a cost of doing business. At least in the case of a reasonably prudent manufacturer or builder, the expense would be manageable.

Negligence was the sole basis upon which the Eighth Circuit decided this case. As the opinion stated:

> We think the better reasoning supports allowing recovery in tort, at least where, as here, there is a finding of actual negligence, as opposed to a mere defect not resulting from any lack of care. If a manufacturer is negligent, that is, if its product was not put together with the ordinary care that a reasonably prudent manufacturer should have used, it should pay for the resulting loss. The contrary rule, that the loss should be borne by the innocent purchaser, is unjust, in our opinion. (756 F.2d 653, Pet. A-8).

Moreover, the law is clear "that the seller's liability for negligence covers any kind of physical harm, including not only personal injuries but also property damage to the defective chattel itself" (Prosser, *Law of Torts* (Fourth Edition, 1971), Section 101, p. 665).

For Pott to label the damage as "only economic loss" does not make the expense of repair and replacement (in this instance $361,757.00) less burdensome to Ingram, the innocent purchaser.

B. There is no square conflict in the circuits.

In its petition, Pott undertakes to distinguish the many decisions upholding admiralty jurisdiction to award damages for

economic losses. In doing so it makes clear that there is not only no conflict in the circuits warranting review by this Court, but there is no principle involved to justify restricting rights of recovery for negligence in admiralty.

In *Jig the Third, supra,* the defect in the shaft and shaft assembly caused severe leakage which sank the vessel. Accordingly, Pott insists there was damage to property other than the product itself. (Pet. 8). However, as the Eleventh Circuit explained with respect to *Jig the Third:*

> The term 'physical damage' in this context, however, is a term of art contemplating an accident 'involving some violence or collision with external objects'...(*Miller Industries v. Caterpillar Tractor Co.,* 733 F.2d 813, fn. 6, 817).

Accordingly, the damage in *Jig the Third* did not constitute physical damage any more than did the sun gear in *Miller Industries.* The Court characterized both the defective shaft in *Jig the Third* and the defective sun gear in *Miller Industries* as "economic loss" for which recovery of damages resulting from negligence was awarded in admiralty. *Miller Industries, supra,* fn. 7, p. 818. Similarly, the Eighth Circuit characterized the faulty steam coils in the Ingram barges as an economic loss.

In the same vein, Pott attempts to distinguish other cases. *Miller Industries v. Caterpillar Tractor Co., supra,* and *Jones v. Bender Welding and Machine Works, Inc., supra,* involve negligent failure to warn of product defects. (Pet. 9) *Carbone v. Ursich,* 209 F.2d 178 (9th Cir. 1953) and *Emerson G.M. Diesel v. Alaskan Enterprises, supra,* deal with special situations relating to fishermen. (Pet. 10). *Union Oil Co. v. Oppen,* 501 F.2d 558 (9th Cir. 1974) involves harm to acquatic life from an oil spill. (Pet. 9-10). Pott observes that somehow "a tort law remedy was not appropriate" when the defect caused by negligence results in damage in the nature of a leaking steam coil.(Pet. 7).

Why a maritime tort action is not appropriate when the damage consists of fractured steam coils but is in order when a boat's steel plate is fractured in a collision is not made clear. Nor does Pott explain why it does not object to admiralty jurisdiction in *Jig the Third* when the vessel went to the bottom of the river as a result of the failure of the defective shaft but views it with alarm when the four Ingram tank barges proceeded to the shipyard for repairs and replacement, by reason of steam coil fractures as a result of inadequate design, defective materials and failure to test.

In attempting to distinguish the numerous decisions in admiralty awarding damages for economic loss, Pott is engaging in an exercise in casuistry. The decisions upholding jurisdiction in admiralty for the recovery of damages caused by negligence of a shipbuilder represent traditional admiralty remedies. Shipping is a dominantly commercial operation. Avoidance of economic damage and loss is a major concern. Strict liability is a doctrine recently incorporated into admiralty law. However, it has been included, where applicable, as an additional remedy. Neither history nor reason suggest that it has displaced or curtailed the tort remedy for negligence in admiralty.

C. Newness of issue suggests delay in review.

This Court has indicated the desirability of allowing issues to mature in reviewing conflicting decisions (*E.I. duPont de Nemours & Co. v. Train,* 430 U.S. 112, 135 n. 26 (1977); and individual members of the Court have expressed the same opinion. William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload,* 66 Judicature 230 (1983). With the passage of time, there are additional cases and opinions, differing views and factual situations, which help illuminate the problem before it is finally resolved. Justice Brennan quoted with approval, the comment of Justice Stevens: "The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result." (*Supra,* 233).

The *East River* decision was rendered in 1985. Judicial rulings on the remedy of economic losses and damages in admiralty actions based on strict liability are few and of recent vintage. It is submitted that *East River* and *Ingram* are not in conflict. *East River* is based on recovery of economic loss under strict liability, a new concept in admiralty; *Ingram* is based on recovery of economic loss under negligence which is a recognized right in admiralty. In any event, consideration of the problem by this Court should be deferred.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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